Armco Steel Company, L.P. *and* Salaried Employees Auxiliary of the Armco Employees Independent Federation, Inc., Petitioner. Case 9–UC–356

September 21, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 11, 1993, the Regional Director for Region 9 issued a Supplemental Decision and Order in which he dismissed the petition for unit clarification. In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review. The Employer filed a brief in opposition.

The Petitioner's request for review of the Regional Director's Supplemental Decision and Order is granted as it raises substantial issues warranting review.

The Petitioner seeks to clarify the existing bargaining unit of clerical and technical employees at the Employer's Middletown, Ohio steel works, commonly known as the salaried unit, to include certain job classifications which, either in form or substance, were within the unit at one time but were moved by the Employer to its general offices complex elsewhere in Middletown. The sole issue now presented[1] is whether the Board's decision in *Gitano Distribution Center*, supra, limits unit clarification procedures to a determination of the unit status of relocated employees vis-a-vis the unit from which they came, *i.e.*, their inclusion or exclusion, and precludes a determination of their appropriateness as a separate unit in their own right. For the following reasons, and contrary to the Regional Director, we find that *Gitano* is not so limited.

The Petitioner represents salaried employees at the Employer's Middletown, Ohio steel plant but not those at the Employer's Ashland, Kentucky plant. As a result of a 1985 efficiency study, the Employer decided to combine traffic office employees for both plants at its general offices complex, located in Middletown, 1-1/2 miles from the steel plant. Employees at the general offices have historically been excluded from the salaried bargaining unit. The Regional Director found that the consolidation began in 1986 and was completed in 1987. In 1988, the Employer decided to establish the ''Outside Processing Inventory Administration'' (OPIA) at its general offices.

The traffic office employees are responsible for scheduling inbound deliveries of raw material and outbound deliveries of finished steel, arranging interplant shipments, and overseeing payment of freight invoices. Traffic office employees work in a large room partitioned into separate cubicles, have frequent face-to-face contact with other transportation employees, and have phone contact with salaried bargaining unit employees. The Regional Director found that 8 of the 14 traffic office employees came from the Middletown salaried unit and 6 from the general offices.[2] In his initial decision, the Regional Director found that they perform the same type of work as was previously done by unit employees.

OPIA coordinators and clerks monitor steel shipped to subcontractors. The coordinators reconcile inventories and oversee the disposition of scrap metal; the clerks assist the coordinators. OPIA employees have daily contact with other employees at the general offices, but little with employees in the salaried unit. The Regional Director found that four of the nine OPIA employees came from bargaining unit positions and that the other five came from the general offices.[3] In his earlier decision, the Regional Director found that the work done by OPIA employees is the same as that done by unit employees prior to 1988.

In his supplemental decision, the Regional Director found that once it has been determined that the relocated employees no longer remain in the existing unit a UC proceeding is, pursuant to *Gitano*, no longer available to resolve the unit placement of the relocated employees.

In *Gitano* we rejected the spinoff doctrine and held (308 NLRB 1172, 1173):

> Rather, we will begin with the Board's long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming that that presumption is not rebutted, we will then apply a simple fact-based majority test to determine whether the respondent is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit. Absent this majority showing, no such presump-

[1] At an earlier stage of the proceeding, in an unpublished Order, the Board granted review of the Regional Director's analysis under the law prior to *Gitano Distribution Center*, 308 NLRB 1172 (1992), and remanded the case to the Regional Director for further consideration under *Gitano*.

[2] The matter is disputed by the Employer and the Petitioner. The Employer contends that two, who were transferred in 1986, performed exclusive work for the Ashland plant and were out of the unit before the 1987 consolidation. On the other hand, the Petitioner argues that nine were transferees from the unit but that one was subsequently replaced by a nonunit employee.

[3] The Employer contends that one of the transferees performed unrelated work when in the salaried unit.

> tion arises and no bargaining obligation exists. [Footnotes omitted.]

Also relevant is footnote 21 at the end of the above-quoted portion of the *Gitano* decision:

> Because the new facility is presumptively a separate unit, we would view as irrelevant to the analysis the question of whether or to what extent the employees at the new facility are performing work that previously was performed by the unit employees at the old facility.
>
> The issue of whether an existing contract would be applicable to the new facility is not before us in the present case. However, if the new facility is a separate unit, it would appear that the contract would not apply, without an agreement that it would apply. See *Kroger Co.*, 219 NLRB 388 (1975).

In his supplemental decision, the Regional Director found that the general offices complex, at which the former unit employees were relocated, is a separate facility even though it is only 1-1/2 miles from the Middletown plant and even though the general offices, as part of corporate headquarters, are inherently involved to some extent in the operations of the production facilities. The Regional Director further found that the traffic office and OPIA employees are managed and supervised separately from the unit employees, that there is no interchange with salaried unit employees, and that there is no regular face-to-face contact with unit employees. Specifically, the Regional Director found that labor relations matters, such as hiring, discipline, benefits, and training, are handled by the general offices supervisors, whose authority does not extend to unit employees at the Middletown plant. Accordingly, the Regional Director found the single-plant presumption has not been rebutted.

In its request for review, the Petitioner contends that the single-plant presumption has been rebutted, citing comparable terms and conditions of employment, geographical proximity, operational integration, and historical inclusion, adding that *Gitano* did not decisively reject reliance on historical inclusion. The Petitioner, however, does not refute the Regional Director's finding that the relocated employees have significant supervision separate from, do not interchange with, and have little face-to-face contact with unit employees.

We agree with the Regional Director, for the reasons he set forth, that the single-location presumption has not been rebutted. Thus, we agree that the existing salaried employees unit cannot be clarified, as requested by the UC petition, to include the relocated employees. This, however, does not end our inquiry.

The Regional Director further found that—even assuming (1) that the relocated employees could constitute a separate appropriate unit and (2) that the relocated employees were a majority in that unit—the Petitioner's representative status in such a unit could not be determined in this UC proceeding. He concluded that this issue could be resolved only in an unfair fair labor practice case or through an election. Citing the Board's Rules and Regulations, Section 102.60(b), the Regional Director stated that a UC proceeding is available only for the purpose of defining the composition of an *existing* unit, not for the purpose of establishing bargaining rights in a new, separate unit.

The Petitioner contends that the Board's remand for reconsideration pursuant to *Gitano* strongly implies that the Board intends that *Gitano* be fully applied in UC proceedings. The Petitioner argues that, unless the Board intends to make unit clarification ineffective, the entire *Gitano* analysis must be applied. In its opposition, the Employer agrees with the Regional Director that the single-plant presumption has not been rebutted and that a UC proceeding is inappropriate to resolve the issues in this case because the transferred employees are no longer part of the salaried employees unit. The Employer does suggest that the Petitioner is not without a remedy inasmuch as it presumably could have litigated its rights in a timely filed unfair labor practice charge.

The Employer alternatively argues that, even if a UC proceeding is available, the petition must be dismissed because the employees who were transferred do not constitute a majority of the 599 employees in the general offices. The Employer contends that there is no factual or legal basis for segregating the noncraft, transferred employees from the rest of the general offices employees because all general offices employees work under virtually identical terms and conditions of employment. The Employer states that there is no such entity as a traffic office or an OPIA department. The Employer contends that *Gitano*, supra at fn. 21, holds that whether former unit employees are performing the same work is irrelevant. However, the Employer contends that, in any event, this case does not involve the transfer of unit work: the traffic office employees handle additional work, particularly former nonunion Ashland work, and only a minor fraction of OPIA work was done by unit employees. Finally, the Employer argues that, even if traffic office and OPIA employees could be considered as an appropriate unit, a majority are not transferees: two of the traffic office employees left the unit over a year prior to the consolidation to do nonunit (Ashland) work and one OPIA employee, although coming from the unit, had no involvement with outside processors. See footnote 2, supra.

As evidenced by the Regional Director's earlier decision, UC proceedings were available prior to *Gitano* to clarify the status of relocated unit employees. Since *Gitano*, however, cases involving relocations will less frequently result in a traditional accretion analysis be-

cause the concept of ''spinoff'' has been discarded. Nonetheless, we believe UC proceedings remain available to determine the unit status of relocated employees.

UC petitions, although most frequently used to clarify unit placement issues, have also been used to clarify unit scope issues. Thus, the Board has used UC proceedings to determine that previously separate units have, by the parties' actions, been merged into a single appropriate unit. See, e.g., *Green-Wood Cemetery*, 280 NLRB 1359 (1986), in which the Board found that the parties' entire course of conduct following recognition of the office clerical unit established an intent to merge the office clerical unit with the field employees unit. Accordingly, the Board found that a single unit of both office clerical and field employees was appropriate.

Similarly, the Board has clarified historical units into two or more appropriate units. In *Lennox Industries*, 308 NLRB 1237 (1992), the Board clarified the existing historical unit into two separate units because of the employer's restructuring of its operations. See also *Ameron, Inc*., 288 NLRB 747 (1988), which clarified the certified unit to constitute two separate units, one at Ameron and one at TAMCO, which had become a separate company, and *Rock-Tenn Co*., 274 NLRB 772 (1985), in which the historical unit was clarified into appropriate separate units at two plants because the historical unit no longer conformed to normal standards of appropriateness.

Although *Gitano* refers to the employees at the ''new facility'' as a presumptively ''separate unit'' and although Section 102.60(b) of the Board's Rules limits unit clarification to ''existing'' units,[4] we find that unit clarification proceedings remain available to determine the unit placement of relocated employees. As set forth above, UC proceedings are not limited to placement of employees in existing units but have been applied to unit scope issues as well. UC proceedings are available to determine whether the historical unit or units are no longer appropriate. In these UC proceedings, the Board determines what bargaining unit or units exist in fact after an employer's reorganization or the parties' agreement. Similarly, using UC proceedings to apply the full *Gitano* analysis would result in the Board's determining what bargaining unit or units exist after an employer's reorganization resulted in the relocation of employees. In such decisions, as in clarifications of historical units, we would not be ''creating'' new units, but would merely be recognizing and defining the units that the parties themselves have created. Thus, UC proceedings would clarify previously recognized units by determining what units have come into being by reason of the employer's reorganization, and hence are cognizable within Section 102.60(b) of the Board's Rules.

As a practical matter, a *Gitano* analysis lends itself to application in a UC proceeding. *Gitano*, by its terms, begins with a determination of whether certain employees relocated by an employer remain a part of the unit from which they came, depending on whether the presumptive appropriateness of a single-location unit has been rebutted. This issue, as the Regional Director observed, remains amenable to resolution in a UC case. If the single-location presumption has not been rebutted, *Gitano* provides that the next step is to apply ''a simple fact-based majority test.'' For many years, the Board has applied a simple majority test to cases involving the merger of represented employees with unrepresented employees. See, e.g., *Central Soya Co*., 281 NLRB 1308 (1986), in which, although an unfair labor practice case, the Board applied UC principles to merged operations and included the unrepresented employees in the unit as the unit employees constituted a majority of the merged group. See also *Renaissance Center Partnership*, 239 NLRB 1247 (1979); and *South Coast Terminals*, 221 NLRB 197 (1975), both unit clarification representation cases in which the Board applied this same type of analysis.

Although not explicitly so stating, *Gitano* also requires an analysis of whether the relocated employees, together with any new employees, would constitute an appropriate unit. Such unit scope issues are as readily resolvable in UC proceedings as they are in any other type of representation proceeding. And, resolution of all the *Gitano* matters in a UC proceeding would frequently be preferable to their resolution in an unfair labor practice proceeding. UC proceedings are generally more expeditious, and will resolve the issues without requiring the employer to commit a possible unfair labor practice in order to have the Board resolve what is, in essence, a representation matter.

In addition, as discussed above, there is clearly jurisdiction to decide, in a UC case, whether employees are included in, or excluded from, an existing unit. If it is decided that they are excluded, a related issue arises as to what other existing unit may include them. Given the clear jurisdiction to decide the former question, we believe that there is also jurisdiction to decide, on the same record, the closely related question.

Accordingly, we find that all Gitano issues can be resolved in this proceeding. We have already affirmed the Regional Director's finding that the single-plant presumption has not been rebutted. Beyond this, whether the transferred traffic office and OPIA employees comprise a majority of the employees in the unit or units at the general offices complex, and whether the traffic office and OPIA employees would themselves constitute a separate appropriate unit, or some other configuration of appropriate units, are

[4] Sec. 102.60(b) states, ''A petition for clarification of an existing bargaining unit . . . may be filed. . . .'' See also Sec. 102.61(d), which sets forth the contents of a unit clarification petition.

issues amenable to resolution in this UC proceeding. Contrary to the Regional Director, we see no legal impediment to using this UC petition to resolve these matters. Accordingly, we shall remand this proceeding to the Regional Director to make a full *Gitano* analysis.[5]

ORDER

This proceeding is remanded to the Regional Director for further consideration in light of this Decision on Review and Order, including a reopening of the record, if necessary, and for the issuance of a supplemental decision.

[5] The Employer has made a number of arguments including the contentions that the traffic office and OPIA employees cannot constitute a unit separate from the general offices employees and that, in any event, a majority have not transferred from unit positions. These matters, as well as other unanswered issues, are for the Regional Director to resolve on remand.